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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAMIE NORBERT RANDALL, Defendant and Appellant.	E047102 (Super.Ct.No. INF057389) OPINION

APPEAL from the Superior Court of Riverside County. Michele D. Levine, Judge. Affirmed.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Michael Murphy and A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Jamie Randall, of two counts of aggravated sexual assault of a minor by rape (Pen. Code, § 269, subd. (a)(1)),[1] aggravated sexual assault of a minor by forcible penetration (§ 269, subd. (a)(5)), aggravated sexual assault of a minor by forcible sodomy (§ 269, subd. (a)(3)) and aggravated sexual assault of a minor by forcible oral copulation (§ 269, subd. (a)(4)). He was sentenced to prison for five consecutive terms of 15 years to life and appeals, claiming evidence was erroneously admitted and he was incorrectly sentenced. We reject his contentions and affirm.

FACTS

Defendant's daughter testified that in 2003 when she was 11 years old, defendant overcame her resistance and removed her overalls, shirt and panties, and had intercourse with her, then threatened to kill her, her mother (his wife) and her brothers (his sons) if she told. When the victim was 12 or 13, and living at a home different than the one when the first incident occurred, what had occurred there was repeated, with the added feature that defendant told the victim that he had a gun. The victim said that defendant had intercourse with her about twice a week when she was 13, which was more than he did when she was 12. The victim described acts of forcible digital penetration that would either precede or follow acts of forcible intercourse. She also described acts of forcible oral copulation and of forcible anal intercourse when she was 12 and 13. While defendant was in jail in early 2007, the victim told her mother what defendant had done to her.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

During an RCAT interview, the victim reported the first incident consistently with her trial testimony. She also reported that defendant had had sex with her once a week when she was 12 and twice a day the two months before she turned 14. She said that anal intercourse began when she was 13.

Defendant was interviewed by a detective and initially asserted repeatedly that he either did not remember or did not know about the alleged sexual activity between him and the victim. However, after having been shown a picture of a cleft in the victim's hymen, he admitted that he might have put his penis in her vagina, he could have ejaculated and he might have rubbed his penis on the victim's butt crack. He admitted that she orally copulated him and grabbed his penis. He admitting rubbing her vagina with his finger, having her orally copulate him about ten times and, like the victim, reported that when he ejaculated, he put the end result in a tissue.

The defendant did not testify at trial and presented only the testimony of his three sons, all of whom were younger than the victim, and none of whom was aware of what the victim claimed and defendant admitted was going on in the family home.

ISSUES AND DISCUSSION

1. *Admission of Evidence*

a. *Opinions of the Detective Who Interviewed Defendant*

During direct examination of the detective who interviewed defendant, the prosecutor pointed out that defendant had said, "I don't know" more than two dozen times during his interview. The prosecutor asked the detective what interview techniques he employed during the interview when he heard those repeated assertions. The detective

replied, "Based on my training and experience, I know that these things are difficult for people to talk about . . . ."[2] The question was repeated and the detective replied that he changed the tone and pace of the interview. The prosecutor asked the detective why he did that. The detective replied that he felt defendant was being evasive. Defense counsel objected on the basis that the detective's opinion had no foundation. The trial court overruled the objection, saying that the detective would be subject to cross-examination. The prosecutor said, "Detective, you said you changed your tone and pace based on what?" The detective replied, "The evasiveness of the response[s] to my questions, to . . . elicit a more truthful response." Defense counsel did not object. The prosecutor then asked the detective if he felt that defendant was being evasive. The detective replied that he did.

Defendant here contends that the trial court abused its discretion (see *People v. Alvarez* (1996) 14 Cal.4th 155, 201) in permitting the detective to testify that defendant was being evasive and that he did what he did to elicit a more truthful response from defendant. We turn first to the detective's opinion that defendant was being evasive.

Defendant's repeated assertions that he did not remember or did not know were to statements by the detective that the victim said that defendant may have touched her inappropriately, questions whether defendant did, why the victim would say such a thing, why defendant would not remember such a thing, how the victim would know that defendant had been circumcised and that he had a medium sized penis, whether defendant

[2] The detective said more, but that portion of his answer was successfully objected to by the defense.

threw the victim down on the bed while she was wearing overalls,[3] how the incidents happened and what defendant remembered about them, whether defendant had ever shown the victim pornography, whether he ever inserted his penis into her vagina, whether he ever ejaculated, how many times certain sexual acts occurred and whether his sons were around when the acts were occurring. Even as defendant began to make admissions, he would follow them up with, "I don't know" or would respond with this after providing some details about incidents, and being asked for more. As the detective said several times during the interview, if *he* had committed or not committed the acts about which he was asking defendant, *he* would have remembered, and so would any normal person, even one who, as defendant claimed, indulged from time to time in smoking methamphetamine. Thus, any juror would have concluded that defendant was being evasive. The jury did not need the opinion of the detective that he was. This fact alone made the admission of the opinion non-prejudicial. Moreover, as the People correctly point out, defendant objected on the basis of foundation, not that the detective's statement was improper opinion evidence, and, therefore, the latter objection was waived. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 81, 82) To the extent trial counsel for defendant was deficient in failing to object on the same basis that defendant now asserts, our disposition of the issue on the merits resolves the matter.

[3] This related to the first incident the victim described.

As to the detective's implied opinion that defendant was not being truthful, which is different from being evasive, we note that defendant did not object to it, therefore, he waived the matter. (Evid. Code, § 353.)

Even if we were to conclude that the detective's statements of opinion, both as to defendant's evasiveness and his truthfulness, were erroneously admitted, reversal is not appropriate. The case against defendant was a particularly strong one. His defense was almost negligible.[4]

b. *Opinion of Sexual Assault Nurse Examiner*

Defendant unsuccessfully objected at trial, on the basis of lack of foundation, to the opinion of the sexual assault nurse examiner who physically examined the victim and took her history, that there was high suspicion of sexual abuse. Defendant here asserts that the trial court erred in admitting this opinion because "the [nurse] provided no basis for her opinion that the [cleft] in the victim's hymen was consistent with sexual abuse." Defendant is incorrect.

The nurse testified that the victim had a large cleft in her hymen, which suggested to the former "some kind of trauma or injury or event has happened and left a mark on the hymen." She added that based on the history the victim gave her, she was under the impression that a trauma or injury had occurred at least six months previously. She

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[4] In fact, reading the transcript of this trial, up to the point when defense counsel made his argument to the jury, it was difficult to predict exactly what the defense would be. Trial counsel for defendant, John Patrick Dolan, is to be commended for his outstanding job arguing this case to the jury. He addressed every conceivable weakness in the prosecution's case.

opined that the injury, when it was fresh, was probably much more severe than what she saw[5] and she explained why. She opined that it could have been caused by repetitive injury and that it was "consistent with multiple events[,]" and she explained why. She said that the history the victim gave her supported the opinion that the injury to the hymen either occurred at an early age or was repetitive. She opined, over defense objection,[6] that the history the victim gave her was consistent with what she found during her physical exam. The nurse was then asked what conclusion she reached about the cause of the cleft. Over defendant's lack of foundation objection, the nurse opined that it was highly suspicious for sexual abuse or sexual activity.[7] She explained that her conclusion was based on the abnormal state of the victim's hymen and that the history supplied by the victim was consistent with it. On cross-examination, however, she conceded that without the history supplied by the victim, she could not exclude a trauma, injury or event that was not sexual activity causing the cleft.

Defendant here contends that the trial court abused its discretion in ruling that there was sufficient foundation for the nurse's opinion that she was highly suspicious of sexual abuse or activity as the cause of the cleft. Defendant concedes that expert opinion on whether an injury is consistent with sexual abuse is proper. (*People v. Mendibles*

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[5] The trial court admitted this opinion, over a defense objection that it was speculative, subject to a motion to strike if foundation was not established for it.

[6] The objections were on the basis of vagueness and lack of foundation.

[7] She testified that a *definite* finding of sexual abuse would be based only on the presence of sperm or the pregnancy of the victim.

(1988) 199 Cal.App.3d 1277, 1293, 1295 (*Mendibles*).) However, defendant asserts that the nurse here did not testify to the same foundation as did the doctor in *Mendibles*. Defendant misunderstands the significance of the statements in *Mendibles*.

In rejecting the defendant's contention that the doctor's opinion was based on a new technique to which the *Kelly-Frye*[8] rule applied and, in dicta, concluding that the expert was qualified to render her opinion, the *Mendibles* court noted that the doctor had examined more than 400 children who had complained of sexual abuse and over 1,000 prepubescent girls. (*Mendibles*, *supra*, 199 Cal.App. 3d at p. 1294.) The doctor had studied preadolescent and adolescent girls, some of whom had complained of sexual abuse and others who had not. (*Ibid*.) The *Mendibles* court noted that the doctor was "well versed in the growing body of literature which describes both the normal condition of the hymen in prepubescent females and the changes associated with sexual abuse. . . . [¶] . . . [¶] . . . She established there is a body of literature reporting medical studies upon which she could base the conclusions she drew from her [physical examination]. Moreover, *the diagnosis of sexual abuse or rape from the observation of certain marks or scarring is nothing new*. [Citation.] . . . [¶] . . . [¶] . . . [The doctor] relied on several articles and studies in this field to determine normal size . . . . There are published, documented scientific studies of children describing the size of the hymenal opening correlated to sexual abuse or penile penetration. . . . [¶] Although the study of child sexual abuse is relatively new, *it has become a major area of focus in medicine within the*

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[8] *People v. Kelly* (1976) 17 Cal.3d 24; *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013.

last three years." (*Id*. at pp. 1294-1295, 1297, italics added.) The physical exam in *Mendibles* occurred in 1984. (*Id*. at p. 1287.) The body of information on the possible causes of anomalies of the hymens of pubescent girls has grown and become much more well established since then. In any event, *Mendibles* does not stand for the proposition that the expert must testify to a body of literature or studies she relied on in forming her opinion in order to offer her opinion.

The nurse testified that she was a 16-year-veteran registered nurse who had conducted more than 200 forensic exams on children, mostly girls, between the ages of 2 and 15 at the Barbara Sinatra Center for five years. She said she had been trained by a nurse that had five years experience and she works alongside a physician. She attended several week-long seminars and trained at the Center for the Vulnerable Child in Los Angeles. She said her report on the victim was reviewed by the doctor, who has the same level of training as she had, and he concluded that there was no need for correction or clarification in her report. We cannot conclude that the trial court abused its discretion (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9, 10), that is, acted unreasonably, in concluding that the nurse was qualified to offer her opinion.

If there was any particular deficit in the nurse's qualifications to offer her opinion, it was incumbent upon defendant to bring it to the court's attention and permit the People the opportunity to address it. A nurse as experienced as this one is competent to testify to what a normal hymen looks like and what one missing a piece, as did the victim's, looks like and to offer explanations about what might have caused that cleft, even without citation to literature and/or studies. Even if her opinion was improperly admitted, we

cannot agree that reversal is appropriate due to the relative strengths of the People's and the defendant's cases.

2. *Sentencing*

The court imposed 15-years-to-life terms for each of defendant's convictions, as was mandated by section 269, subdivision (b).[9] In response to defense counsel's request that the court not run the sentences for the two aggravated sexual assault by rape convictions consecutive to each other, the court said, "I agree with the People that this was, in the Court's mind, a question of the jurors why there were not more counts that were to be charged in this instance. I understand the filing choice that was exercised here also was, in essence, an underfiling of the number of actions that were endured by [the victim] during the course of her lifetime; that . . . there was [a] time period within which [defendant] could've thought and had some reflection [between these two acts] about what [he was] doing. It was not the situation where this act was happening consecutively after having an act of sexual intercourse, to do so again almost immediately thereafter. These were events that occurred over a long period of time, and in fact, in different homes, and the Court finds that it is appropriate to fully and separately consecutively sentence [defendant] on these matters." The court ran the term for the forcible sexual penetration conviction consecutive to the term for the first rape because defendant

[9] That subsection provided in pertinent part, "Any person who violates this section . . . shall be punished by imprisonment in the state prison for 15 years to life." The offenses listed in section 269 include rape, forcible sodomy, forcible oral copulation, and forcible sexual penetration where the victim is under 14 and 10 years or more younger than the defendant. (§ 269, subd. (a).)

assaulted a child while being in a position to protect her, which position he abused, the crimes were committed during different periods of time, when there was an opportunity for defendant to reflect and they were done in such a way as to cause great fear to the victim, including threatening the victim, her mother and her brothers. The court ran the terms for the forcible sodomy conviction, the forcible oral copulation conviction and the second rape conviction consecutive to the terms for the other convictions for the same reasons.

Defendant here contends that the sentencing court erroneously applied the mandatory full separate and consecutive sentencing provisions of section 667.6, subdivision (d). Section 667.6, subdivision (d) did not at the time defendant committed these crimes, and still does not, expressly include convictions under section 269, subdivision (a). However, in *People v. Figueroa* (2008) 162 Cal.App.4th 95, 98 [Fourth Dist., Div. Two], this court concluded that where the information charged defendant with violations of the offenses listed in section 667.6, subdivision (d), which constituted violations of section 269 because the victim was under 14 and the defendant was at least 10 years older than the victim, and the jury was instructed to find violations of those offenses beyond a reasonable doubt, the mandatory full consecutive sentencing provisions of section 667.6 applied. We so held despite the fact that section 269 was amended effective September 20, 2006, after Figueroa committed his crimes, to, for the first time, mandate the imposition of consecutive sentences if the crimes involved the same victim on different occasions. (*Id*. at pp. 98-100.) Defendant acknowledges our holding, which remains good law, states his disagreement with it and asserts the issue in

order to preserve his claim before the California Supreme Court, which has not yet addressed the issue.

Next, defendant asserts that even if the mandatory full consecutive provisions of section 667.6 are applicable, remand is required because the sentencing court failed to sufficiently articulate a factual basis for concluding that each crime occurred on a separate occasion, as the section requires. Section 667.6, subdivision (d) provides, "In determining whether crimes against a single victim were committed on separate occasions . . . , the court shall consider whether, between the commission of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his . . . actions and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his . . . opportunity to attack, shall be, in and of itself, determinative of the issue of whether the crimes in question occurred on separate occasions."

Defendant relies on *People v. Irvin* (1996) 43 Cal.App.4th 1063, in contending that the sentencing court's statement of reasons for imposing full consecutive terms under section 667.6 is inadequate in that it fails to sufficiently articulate the basis for its finding that each crime occurred on a separate occasion. However, the issue in *Irvin* was not whether the trial court's statement was inadequate—rather, defendant contended that, in fact, not all his convictions occurred on separate occasions. (*Id*. at p. 1067.) The trial court in *Irvin* articulated the basis for its findings, but that explanation did not specifically address how the occasion of each crime was separate from the occasion of the others. (*Id.* at pp. 1069-1070.) It held that the sentencing court's statement of reasons for

imposing full mandatory consecutive sentences was insufficient to allow the appellate court to determine if its conclusions were correct. (*Ibid*.) This is not the case here.

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P.J.

We concur:

McKINSTER
J.

KING
J.